Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1999

C.A NO. 99-1611
D.C. NO. 98-4223

CHRISTOPHER A. LOPEZ,

Petitioner,

v.

RANDY J. DAVIS, Warden, Federal Prison Camp, Yankton; and FEDERAL BUREAU OF PRISONS,

Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the director of the Bureau of Prisons has the authority to categorically deny consideration for eligibility for early release as proscribed by 18 U.S.C. § 3621(e)(2)(B) to an inmate convicted of a nonviolent offense after the inmate has completed the requisite residential substance abuse program.

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IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

CHRISTOPHER LOPEZ, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	PETITION FOR WRIT OF CERTIORARI

The Petitioner, Christopher Lopez, by and through his appointed counsel of record, Mark V. Meierhenry, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on August 10, 1999, petition for rehearing or rehearing en banc denied September 16, 1999.

QUESTION PRESENTED FOR REVIEW

Whether the director of the Bureau of Prisons has the authority to categorically deny consideration for eligibility for early release as proscribed by 18 U.S.C. § 3621(e)(2)(B) to an inmate convicted of a nonviolent offense after the inmate has completed the requisite residential substance abuse program.

OPINIONS BELOW

On August 10, 1999, the Court of Appeals for the Eighth Circuit entered an opinion reversing the decision of the United States District Court for the District of South Dakota which held that the director of the Bureau of Prisons does not have the authority to categorically deny consideration for early release under 18 U.S.C. § 3621(e)(2)(B) to inmates convicted of nonviolent offenses. Bellis v. Davis, 186 F.3d 1092 (8th Cir. 1999). Petition for rehearing and rehearing in banc were denied on September 16, 1999. A copy of the opinion of the Court of Appeals is attached as Appendix 1. A copy of the opinion and order of the District Court is attached as Appendix 2.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Petitioner is seeking review of the judgment of the United States Court of Appeals for the Eighth Circuit entered on August 10, 1999. Petition for rehearing or rehearing en banc was denied by the Untied States Court of Appeals for the Eighth Circuit on September 16, 1999. See Appendix 3.

STATUTORY & REGULATORY PROVISIONS INVOLVED

1. 18 U.S.C. § 922(g). Appendix 4.
2. 18 U.S.C. § 924(c). Appendix 5.
3. 18 U.S.C. § 3621(e). Appendix 6.
4. 28 C.F.R. § 550.58 (1995). Appendix 7.
5. 28 C.F.R. § 550.58 (1997). Appendix 8.

6. Bureau of Prisons Program Statement 5162.02 (July 24, 1995). Appendix 9.
7. Bureau of Prisons Program Statement 5162.04 (October 9, 1997). Appendix 10.
8. Report 103-320, U.S. House of Representatives Committee on the Judiciary. Appendix 11.

STATEMENT OF THE CASE

The Petitioner, Christopher A. Lopez, is currently serving a 72-month sentence for his conviction of possession with intent to distribute methamphetamine. His anticipated release date from prison is June 2, 2002.

Petitioner Lopez, along with nine other prisoners, filed petitions with the U.S. District Court for the District of South Dakota seeking a writ of habeas corpus instructing the Warden of the Federal Prison Camp at Yankton, South Dakota to grant them a one-year sentence reduction pursuant to 18 U.S.C. § 3621(e)(2)(b).

The prisoners contention was that the Bureau of Prisons improperly classified them as ineligible for early release under 18 U.S.C. § 3621(e)(2)(b) in light of the Eighth Circuit's decision in Martin v. Gerlinski, 133 F.3d 1076 (8th Cir. 1998). Title 18 U.S.C. § 3621(e)(2)(b) provides for a one-year sentence reduction for prisoners who successfully complete the Residential Drug Abuse Program.

On January 6, 1999, the U.S. District Court for the District of South Dakota granted the petition of Petitioner Lopez and ordered the Bureau of Prisons to re-evaluate Lopez

for early release in accordance with its opinion. The District Court concluded that under the language of 18 U.S.C. § 3621(e)(2)(b), Martin, and Orr v. Hawk, 156 F.3d 651 (6th Cir. 1998), the Bureau of Prisons exceeded its statutory authority by categorically declaring certain inmates who had not been convicted of violent offenses ineligible for the early release provision.

The government then appealed the District Court's decision to the United States Court of Appeals for the Eighth Circuit. The Petitioner's case was consolidated on appeal with that of the nine other inmates making similar petitions for writs of habeas corpus. The case was decided on August 10, 1999, by Judges Loken, Hansen and Morris Sheppard Arnold of United States Court of Appeals for the Eighth Circuit. The Circuit Court concluded that the Bureau of Prisons acted within in its authority in excluding Lopez from the early release program. See Exhibit 1.

Lopez submits that the director of the Bureau of Prisons does not have the authority to categorically deny consideration for early release under 18 U.S.C. § 3621(e)(2) to inmates convicted of nonviolent offenses. The decision of the Eighth Circuit reversing the District Court is in direct conflict with the plain language of the statute and the intent of Congress and is in conflict with the Sixth Circuit's holding in Orr v. Hawk, *supra*.

REASONS FOR GRANTING WRIT

I. THE BUREAU OF PRISONS IS EXCEEDING ITS STATUTORY AUTHORITY AND ACTING IN DIRECT CONFLICT WITH CONGRESSIONAL INTENT IN APPLYING 18 U.S.C. § 3621(e)(2)(B) WHICH AFFECTS A FEDERAL LAW OF EXCEPTIONAL IMPORTANCE IN THAT IT DEALS WITH THE LIBERTY OF PERSONS WHO ARE INCARCERATED AND MAY BE ELIGIBLE FOR RELEASE.

This case involves the erosion of congressionally mandated rehabilitation.

The United States federal prison population has soared from 21,266 inmates housed in federal facilities in 1970 to 106,536 inmates as of May 1998. Federal Bureau of Prisons *Quick Facts*, updated October 1999. The population has risen to 120,671 as of October 1999. Id. The prison population increase has been caused predominantly by sentencing guidelines effecting drug users. Id.

According to the reports of the Bureau of Prisons, in 1970, of the 21,266 federal inmates, only 16.3% of those inmates were imprisoned for drug related offenses. Id. In comparison, of the 106,536 inmates incarcerated in 1998, 58.9% of those inmates were imprisoned for drug related offenses. Id.

The percentage of federal inmates convicted of drug offenses rose 361% over a 28-year period. Id. And that does not include those inmates that are incarcerated for crimes not characterized as drug offenses but for which drugs played an integral role in the offense. Id.

There can be no argument that drug addiction is the most rampant plague that this country has had to face in the latter

part of the twentieth century. As the numbers show, the federal prison population has increased over 500% in a little short of thirty years because of drugs. Id.

In 1990, Congress recognized that something had to be done to assist in the rehabilitation of those prisoners that suffered from drug addiction. Without treatment, there could be no hope to prevent continued involvement with drugs once an inmate returned to society. Congress's answer was 18 U.S.C. § 3621.

In subsection (b) of that statute, Congress required the Bureau of Prisons to "make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse." Id.

In a further effort to promote rehabilitation of inmates suffering from drug addiction, Congress enacted an incentive program to encourage inmates to participate in rehabilitation programs. The incentive program, enacted in 1994, provided that if a federal prisoner would enroll in and successfully complete a the Bureau of Prisons' drug treatment program, then the inmate would be eligible for a sentence reduction of up to one year. Title 18 U.S.C. § 3621(e)(2)(B) provided as follows:

> **(2) Incentive for prisoner's successful completion of treatment program.** - . . .
> **(B) Period of Custody.** - the period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

The legislative history of 18 U.S.C. § 3621(e)(2)(B) indicates that both Congress and the President recognized the interrelationship of drugs and crime.

Report 103-320 of the House of Representatives Committee on the Judiciary outlines the clear statistical data showing that drug addiction equals crime and that by treating inmates' drug problems, recidivism can be dramatically reduced. Appendix 11. The report states that drug addiction increases an inmate's rate of predatory criminal activity by more than 800%. Id. at 2-3. Further, one particular study done showed that when inmates received drug treatment in prison, three years after being released from custody, 78% remained out of prison. Id. at 3. While in that same time period, of those that did not receive treatment, half were back in prison. Id. at 3.

From 1990 (when treatment was first made available to inmates) to 1994, only 6,000 of over 100,000 inmates were involved in the drug treatment program. Id. at 3. This was unacceptable to Congress and the President. Id. at 4.

The Committee on the Judiciary of the United States House of Representatives noted the absolute need for incentives to encourage inmates to participate in the programs. Id. at 3. The Committee's report states:

> The Committee believes . . . an incentive is necessary to draw into treatment many inmates who may not otherwise be willing to undergo a difficult and painful treatment program. Residential substance abuse programs are rigorous, 24-hour-a-day experiences requiring a great deal of work, effort and commitment from the

> participants. The experience of treatment programs at the State level shows that inmates who are given an incentive to begin treatment often realize that the effort will ultimately yield a meaningful improvement in the inmate's life opportunities, and will undertake to complete the program.

Id. at 4.

As the Court will note from the Committee's report, the incentive contained in 18 U.S.C. § 3621(e)(2)(B) was of monumental importance in the overall plan to provide inmates with drug treatment.

Congress did make one proviso on eligibility for the drug program. In enacting the incentive provision of 18 U.S.C. § 3621(e)(2)(B), Congress excluded from consideration for the sentence reduction those inmates convicted of violent offenses.

The Bureau of Prisons has gone one step farther and enacted regulations that categorically exclude from consideration for the incentive program inmates convicted of non-violent but whom the director feels in her discretion should be excluded from case-by-case eligibility. Based on the director's discretion, the inmates listed in BOP Program Statement 5162.04 do not warrant individual consideration and categorically ineligible.

The Eighth Circuit Court of Appeals upheld the BOP's actions in Bellis v. Davis, 186 F.3d 1092 (8th Cir. 1999).

The Eighth Circuit Court of Appeals and the Bureau of Prisons have destroyed Congress's incentive plan as incorporated in 18 U.S.C. § 3621(e)(2)(B). The effect of the ruling by the Eighth Circuit Court of Appeals in Bellis is

that the Bureau of Prisons through its erroneous classification system can refuse to implement 18 U.S.C. § 3621(e)(2)(B) as clearly intended by Congress.

As a result of the erroneous ruling, the congressional intent of promoting drug rehabilitation is in serious jeopardy.

During 1994, 535 members of Congress debated and crafted a system to encourage rehabilitation. The bill was signed by President Clinton. With the ruling below now in her back pocket, the director of the Bureau of Prisons as one person can destroy the entire statutory scheme by the exercise of her discretion unfettered by overzealous Courts of Appeal.

Based on the director's cart blanche discretion given to her by the Court of Appeals, the Bureau of Prisons has now expanded that exclusion to include inmates convicted of violation of the Northern Pacific Halibut Act, violation of the National Fishery Management Program, violation of the Antarctic Marine Living Resources Convention, and violation of the North Pacific Anadromous Stock Convention. Appendix 10 at 13.

The entire statutory scheme envisioned by Congress will be destroyed if the Court of Appeals ruling stands and the director of the Bureau of Prisons has the power to categorically deny inmate access to the drug treatment programs they so desperately need.

The BOP relies on Congress's use of the word "may" in 18 U.S.C. § 3621(e)(2)(B) as a license to amend the United States Code and disregard the plain meaning of the statute.

1. The word "may" in a statute does not delegate to an agency that authority to change the clear meaning of the statute.

Title 18 U.S.C. § 3621(e)(2)(B) provides that after an inmate completes his drug program, his sentence "may be reduced by the Bureau of Prisons." It is this language upon which the BOP relies as its blanket authority to categorically exclude whoever it so desires.

The BOP is claiming that the term "may" in 18 U.S.C. § 3621(e)(2)(B) effectively grants the BOP the power to determine categorically which inmates can be considered for the benefits of the statute. Had Congress intended that the BOP was the proper judge of eligibility, Congress would not have limited the eligibility to those convicted of non-violent offenses. Congress would have stated that the BOP has the sole discretion to determine which prisoners should be eligible and which prisoners should not be eligible.

The word "may" as used in the sentence does not show an intent by Congress to give the BOP the authority to determine which classes of inmates shall be eligible. The word is used in an effort to avoid creating a right to a sentence reduction for every prisoner who fits the category. It is a way to grant the BOP the discretion to deny early release in those special situations where release may not be warranted. It

should not be construed as an invitation to rewrite the statute and limit the class of prisoners which are eligible for the program contrary to Congress's direction.

The United States Supreme Court has addressed the attempt by an agency to use limited discretion granted by Congress as authority to rewrite the legislative scheme passed by Congress. In MCI Tel. Corp. v. AT&T Co., 512 U.S. 218, 144 S.Ct. 2223, 129 L.Ed. 182 (1994), the Federal Communications Commission (FCC) attempted to detarrif all nondominant long distance carriers which were required to file tariffs with the FCC under 47 U.S.C. § 203(a). This attempt by the FCC effectively exempted every long distance carrier from the filing requirement of § 203(a) except AT&T.

The FCC relied on the language provided in 47 U.S.C. § 203(b) as its authority to detariff any common carrier it so chose. 512 U.S. at 223, 114 S.Ct. at 2228. Section 203(b) authorized the FCC to "modify" any requirement of § 203. Id.

The Supreme Court held that the authority of the FCC to "modify any requirement" of 47 U.S.C. § 203(a), as provided in § 203(b), did not authorize the FCC to make basic and fundamental changes in the regulatory scheme enacted by Congress. Id.

In so holding, the Supreme Court reasoned:

> "What we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934."

512 U.S. at 231-32, 114 S.Ct. 2232.

The same analysis can be used in deciding the case at hand. What the BOP is doing is attempting to fundamentally revise 18 U.S.C. § 3621(e)(2)(B). The BOP is attempting to change the statute from one that allows the early release of prisoners convicted of nonviolent offenses to a statute that allows early release only to prisoners convicted of nonviolent offenses and who also have not been convicted of possession of a firearm or have not received a sentence enhancement for possession of a firearm. As the Supreme Court said: "That may be a good idea, but it was not the idea Congress enacted into law" by its passage of § 3621(e)(2)(B). Id.

Even in MCI, where Congress has specifically granted an agency the power to "modify" the law as enacted by Congress; the Supreme Court has held that the agency may not fundamentally change the basic tenants of Congress's enactment. The FCC could not, under the guise of discretion, exclude from the tariffing requirement certain common carriers. The BOP cannot categorically deny eligibility of certain prisoners.

2. The Court need not give deference to an agency's interpretation when such interpretation is in conflict with the plain language of the statute.

The District Court held that the BOP had "exceeded its authority by interpreting 18 U.S.C. § 3621(e)(2)(B) in a manner inconsistent with the plain language of the statute." Appendix 2 at 7. Title 18 U.S.C. § 3621(e)(2)(B) specifically

states which prisoners will be eligible for a sentence reduction. Any attempt by the BOP to limit the classes of prisoners that are eligible in excess of the class stated in the statute is an interpretation inconsistent with the plain meaning of the statute.

An agency's interpretation of a statute is to be accorded no deference by the reviewing court when the agency's interpretation is inconsistent with the plain meaning of the statute. Martin, 133 F.3d at 1079 (citing Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 171, 109 S.Ct. 2854, 2863, 106 L.Ed.2d 134 (1989)). Thus, the Court is not required, and should not, give deference to the BOP's interpretation of 18 U.S.C. § 3621(e)(2)(B).

II. THE EIGHTH CIRCUIT'S RULING IS IN DIRECT CONFLICT WITH THE LAW OF THE SIXTH CIRCUIT.

The Sixth Circuit has already addressed the BOP's flagrant attempt to disregard the will of Congress. In Orr v. Hawk, 156 F.3d 651 (6th Cir. 1998), the Sixth Circuit held invalid the BOP's attempt to classify a violation of 18 U.S.C. § 922(g) - felon in possession of a weapon - as a crime of violence and thus deny inmates access to 18 U.S.C. § 3621(e)(2)(B).

The Orr court held that the BOP had exceeded its authority when it denied eligibility for early release based on a conviction of felon in possession of a weapon under 18 U.S.C. § 922(g). The Court ruled that the BOP "has no choice but to define `nonviolent offense' under 18 U.S.C. §

3621(e)(2)(B) by reference to what might constitute a ``crime of violence." Id. at 655 (citing United States v. Mayoette, 76 F.3d 887, 889 (8th Cir. 1996)). The first step in determining eligibility is to determine whether the prisoner has been convicted of a "crime of violence."

The Court in Orr specifically held that violation of 18 U.S.C. § 922(g) was not a "crime of violence." The Court stated: "No section of the United States Code defines crimes of violence - with the exception of the repealed 42 U.S.C. § 3796ii-2(1)(A) - to include 18 U.S.C. § 922(g) as a violent crime. Several sections of the Criminal Code define crimes of violence, but none mentions mere possessory offenses as falling within its purview." Id. at 655-56.

The Court concluded: "[i]t follows, then, that if the BOP cannot deny eligibility for consideration for early release to anyone who has committed a nonviolent offense, it can deny eligibility only to those who have committed a crime of violence." Id. (emphasis added).

The Sixth Circuit found that the operative language of § 3621(e)(2)(B) is "convicted of a nonviolent offense". Any attempt by the BOP to categorically deny eligibility based on other ground is against the plain language of the statute. Orr, at 655.

The Sixth Circuit has rejected the BOP's position that the language "may be reduced" gives BOP unfettered authority to limit eligibility to the early release program.

A conviction for felon in possession of a firearm and a felony conviction coupled with a sentence enhancement for possession of a firearm are not convictions for crimes of violence. The Sixth Circuit has ruled that such considerations are an impermissible foundation upon which to deny eligibility for sentence reductions. The Eighth Circuits decision in Bellis, *supra*, is in direct conflict.

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully requests that the petition for a writ of certiorari be granted.

Dated this 14th day of December, 1999.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Petition for Writ of Certiorari and Appendix for Writ of Certiorari was served by depositing the same in the United States Post Office in Sioux Falls, South Dakota, with first-class postage thereon fully prepaid this 15th day of December, 1999.

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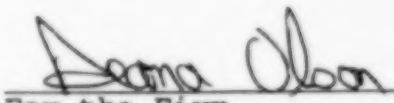

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